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**BEFORE THE ARIZONA CORPORATION COMMISSION**

2003 OCT 15 P 3:51

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Commissioner  
**MARK GLEASON**  
Commissioner  
**KRISTIN K. MAYES**  
Commissioner

Arizona Corporation Commission  
**DOCKETED**

OCT 15 2003



IN THE MATTER OF U S WEST  
COMMUNICATIONS, INC.'S  
COMPLIANCE WITH § 271 OF THE  
TELECOMMUNICATIONS ACT OF  
1996

DOCKET NO. T-00000A-97-0238

IN THE MATTER OF QWEST  
CORPORATION'S COMPLIANCE  
WITH SECTION 252(e) OF THE  
TELECOMMUNICATIONS ACT OF  
1996

DOCKET NO. RT-00000F-02-0271

ARIZONA CORPORATION  
COMMISSION

DOCKET NO. T-01051B-02-0871

Complainant.

v.

QWEST CORPORATION

Respondent.

**POST-HEARING BRIEF OF  
TIME WARNER TELECOM OF ARIZONA LLC**

October 15, 2003

## **I. INTRODUCTION**

Time Warner Telecom of Arizona LLC ("Time Warner Telecom") urges the Administrative Law Judge to reject the Settlement Agreement proposed by Qwest Corporation and Commission Staff. The Settlement Agreement submitted for approval is anticompetitive, not in the best interest of consumers, and probably unlawful. Time Warner Telecom proposes that the Commission direct the parties (Qwest, Staff, the Residential Consumer Office, and all interested competitors) to meet immediately and negotiate a truly global settlement. Even if full agreement cannot be reached on all aspects of such an agreement, such negotiations could yield a framework for a global settlement, which could then be refined and finalized by the Commission.

## **II. THE SETTLEMENT PROCESS**

### **A. Flawed Negotiations**

The Settlement Agreement submitted jointly by Qwest and Staff is unacceptable to every other party to this proceeding. This should be no surprise. In developing this settlement, Qwest and Staff declined to consider the views of any other party until after the deal had been struck. When Qwest's competitors and the Residential Utility Consumer Office ("RUCO") joined in voicing strong objections to the deal, their concerns were ignored.

As illustrated in a chart attached hereto at Tab 1, this settlement was negotiated over a period of months. Staff's involvement in the settlement process began on April 29, 2003, when David Ziegler, Assistant Vice-President for Qwest Services Corporation, called Utilities Division Director Ernest Johnson and suggested a negotiated settlement of

the three enforcement dockets. During the ensuing weeks, Staff and Qwest met, principally by telephone, to reach agreement on an "Outline of Principles" that would evolve into the Settlement Agreement.<sup>1</sup> During this period, neither Staff nor Qwest notified Competitive Local Exchange Carrier ("CLEC") parties that negotiations were ongoing or that a framework for the proposed Settlement was nearing completion. Nor did Qwest or Staff file any sort of notice in the docket informing parties that settlement negotiations had commenced. This failure was not due to Staff's inability to contact CLEC parties. Indeed, Staff had in this very docket thoroughly canvassed the CLEC community for information concerning all unfiled agreements.<sup>2</sup>

It was not until June 11, 2003, two months after the negotiations began, that Qwest notified RUCO that settlement negotiations with Staff were underway and shared with RUCO a copy of the Outline of Principles (dated June 9, 2003). Again, no effort was made to give notice to CLEC parties.

On Friday, June 27, 2003, two months after Qwest initiated discussions with Staff, CLECs were indirectly notified that settlement was being discussed. By this time, of course, the Settlement Agreement was virtually completed:

Qwest and Staff are in the process of negotiating a settlement agreement that involves the 271 Sub-Docket. The parties anticipate that these negotiations will conclude shortly. If a settlement is reached

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<sup>1</sup> Hearing Exhibit S-1, Direct Testimony of Ernest G. Johnson, pp. 3-4.

<sup>2</sup> See Tab 2, Supplemental Staff Report and Recommendations, Exhibit A. Docket No. RT-00000F-02-0271 (August 14, 2002).

and subsequently approved, any prior determinations made regarding further proceedings may become moot.<sup>3</sup>

This indirect notice of settlement talks – conveying that negotiations were virtually concluded – demonstrated that neither Qwest nor Staff expected the negotiated deal to change as a result of CLEC input.

The following week, Thursday, July 3, 2003, Staff emailed the Outline of Principles to five eligible CLECs referred to by staff as the “active” CLECS. In the days that followed, Qwest met twice with select CLECs (including Time Warner Telecom), by telephone and in person. During these meetings, CLECs objected vigorously to the structure of the Agreement, the exclusion of CLECs from negotiations, and the complete failure of the Agreement to remedy the harm caused by Qwest in the dockets being settled. These concerns were ignored. As the testimony of David Ziegler confirms, these objections resulted in no substantive modifications to the basic settlement:

Q. Now, you agree the principles in the Outline of Principles were agreed to by Qwest and Staff, correct.

A. Yes.

Q. Now, did Qwest have any intentions of changing the Outline of Principles in response to CLECs’ concerns?

A. Qwest was willing to listen to what the concerns were. Many of the, I won’t say many, there were many suggestions made by CLECs during the discussions. Some of those suggestions were incorporated into the final Settlement Agreement. They did not change the settlement deal points, if you will, the bullet points, but there were things that were, some were adopted and some were not in the final Settlement Agreement that Staff adopted that were raised by CLECs.

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<sup>3</sup> See Joint Motion to Extend Time for Procedural Conference, p. 1 (filed in Docket No. T-00000A-97-0238).

Q. I think what I just heard you say is as far as the bullet points on the Outline of Principles, those did not change?

A. That's correct.<sup>4</sup>

The first time the Settlement Agreement was distributed to all parties of record in the three dockets was July 25, 2003, when Staff and Quest jointly filed the Notice of Filing Settlement Agreement and Request for *Expedited Procedural Conference*.

The process used to broker a settlement in these three substantial Utilities Division dockets was not consistent with the Commission's policy for settling multi-party Utilities Division cases.<sup>5</sup> Pursuant to the Settlement Policy, all parties to the docket are to be given notice by a docket filing three business days in advance of settlement discussions involving Commission Staff.<sup>6</sup> It was only by declining to follow these procedures that Qwest and Staff managed to conclude their negotiations almost entirely without the CLECs' knowledge. Thus was unfortunate. The Commission's policy regarding notice does not detract from the Commission's general policy of encouraging resolution through settlement, nor is it inconsistent with the use of confidential settlement discussions between select parties. The policy simply gives all participants, the general public, and the Commissioners, notice that settlement negotiations are underway. Notice to CLECs

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<sup>4</sup> See Hearing Transcript ("Tr.") at 82-83.

<sup>5</sup> Any suggestion that this policy applies only to "rate cases" surely must fail. Qwest will never again file a traditional rate case and large cases involving Qwest certainly deserve the same protections afforded other Utilities Division cases.

<sup>6</sup> See Tab 3, Excerpt from 2/8/01 Open Meeting on Commission Settlement Policy and Process, ("Settlement Policy").

and RUCO in this case could very well have resulted in a different settlement, with broader support and a more rapid timeline for implementation.

In sum, the process employed by Qwest and Staff in settling these dockets violated Commission policy and resulted in an agreement that is unacceptable to a majority of the parties participating in the various dockets.

#### **B. Procedural Status of Dockets Being Settled**

CLEC frustration is extraordinarily high in this case due to the substance and the procedural status of the dockets subject to settlement. After costly participation in these three dockets, the CLECs were awaiting orders that would effectively address Qwest's anti-competitive conduct. They expected recommended orders that would progress to open meeting quickly and become effective almost immediately. Instead, they are now faced with a proposed settlement plan requiring those CLECs that opt-in to wait in excess of six months to receive not cash, but a bill credit.

Contrary to Staff suggestion during the hearing, the three dockets being settled involved direct harm to CLECs. Each docket concerned Qwest's anti-competitive conduct. First, there was the 252(e) unfilled agreements case (Docket No. RT-00000F-02-0271), where Qwest secretly negotiated product and service discounts with two CLECs ("favored CLECs"). CLECs competing against the favored CLECs could not match the prices offered by the favored CLECs and thus lost (or never acquired) many customers. The second docket involved Qwest's failure to implement the rates ordered by the Commission in June of 2002. The payment and true-up resulting from Staff's Order to Show Cause did not fully compensate all CLECs, particularly those strapped for

cash during the six month period when new, lower prices were not available. The third docket involved Qwest's manipulation of CLEC participation in the Section 271 proceeding. Each of these dockets involved conduct by Qwest that harmed CLEC interests. Two of these dockets had progressed to the point that parties were awaiting a recommended opinion and order. Tr. 444. In the third docket, the Section 271 sub-docket, Staff had issued its report and further proceedings were halted by the settlement negotiations. Staff's willingness to settle these cases without including CLECs in the substantive negotiations, took CLECs by complete surprise.

### **III. THE AGREEMENT IS ANTICOMPETITIVE AND UNLAWFUL**

The flawed settlement negotiation process produced a settlement deal that is unfair to CLECs and likely unlawful.

#### **A. The Settlement Agreement Is Unfair to Competitors**

In the Section 252(e) Secret Agreements case, Eschelon and McLeod both received a ten percent discount on all services purchased from Qwest. Commission Staff acknowledge the importance of this pricing advantage for these "favored" competitors: "The most significant concession provided to both Eschelon and McLeod in their unfiled agreements was a 10 percent discount on all of the carriers' purchases of Qwest's services, including but not limited to, Section 251(b) and (c) services ... ."<sup>7</sup> McLeod and Eschelon received discounts on *all* services purchased from Qwest, including *interstate*

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<sup>7</sup> See Staff's Initial Post-Hearing Brief at 16-17 (Docket No. RT-00000F-02-0271).

*and intrastate switched and special access, Section 251(b) and (c) services and private line services.* Tr. at 442-43.

In contrast, the Settlement Agreement gives CLECs a retroactive ten percent discount for *only* Section 251(b) and (c) services. The practical effect of limiting the remedy to certain services is enormous for carriers like Time Warner Telecom. Time Warner Telecom competes alongside Eschelon and McLeod for a similar customers. While Eschelon and McLeod were “favored” CLECs, Time Warner Telecom lost ground as a competitor because it was unable to match the prices charged by the “favored” CLECs. Now, Staff and Qwest propose a discount to remedy that harm, but the discount applies only services that Time Warner Telecom does not typically buy. Because Time Warner Telecom did not buy a significant volume of Section 251(b) and (c) services during the discount period, Time Warner Telecom would receive only \$26,877 under the Settlement Agreement. In contrast, if Time Warner Telecom were given a ten percent discount on *all* services for the same discount period, the amount paid by Qwest would be nearly twelve times this amount.<sup>8</sup>

It is critical to Time Warner Telecom that the discount apply to *all* services purchased from Qwest – particularly interstate services. And since the discount for “favored” CLECs applied to all services, it is only fair that the discount created to remedy that practice should apply to all services as well. Such a discount would not result in an

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<sup>8</sup> See Response to TWT 02-002; Tr. 169.

excessive penalty, in light of the egregious conduct by Qwest.<sup>9</sup> However, if the Commission believes such a remedy would be excessive, it should simply adjust the discount percentage. This method would be far more equitable than striking entire categories of service, thereby leaving some CLECs with little or no compensation.

**B. The “Voluntary Contributions” Portion of the Agreement Is Likely Unlawful**

The Settlement Agreement requires Qwest to make “Voluntary Contributions” totaling \$6 million to education, economic development, and infrastructure development in underserved areas. The Director of the Utilities Division, or the Commission, will direct how and where these dollars are spent.<sup>10</sup> The language in the Agreement is extraordinarily broad, permitting the money to be put towards any investment that promotes “the general welfare or safety of consumers.”<sup>11</sup> While the Commission’s goals in specifying this remedy are well-intentioned, this portion of the Agreement is likely unlawful.

It is unclear whether the Commission has the constitutional or statutory authority to assess a penalty and use the proceeds to fund yet-to-be-identified projects.<sup>12</sup> Arizona’s Constitution specifies that civil penalties assessed by the Commission are to be paid into

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<sup>9</sup> According to AT&T/TCG 05-001S1 Supplemental Response, a 10% discount on all services would require Qwest to pay between \$28.5 and \$30.5 million.

<sup>10</sup> See Testimony of David Ziegler in Support of Proposed Settlement Agreement, pp. 8-9.

<sup>11</sup> Settlement Agreement, p. 4.

<sup>12</sup> See A.

the State's general fund, unless otherwise provided by statute.<sup>13</sup> Furthermore, actions to recover penalties are brought in the name of the State. *See* A.R.S. §40-429. If the \$6 million to be set aside for "voluntary contributions" is in reality a redirected penalty,<sup>14</sup> the Commission is exceeding its authority as it has no constitutional authority to divert penalty payments from the general fund.

Similarly, a problem may exist with respect to the Commission's lack of authority to appropriate funds. In Arizona, the Legislature retains all appropriations authority with respect to the Commission. *See Millett v. Frohmler*, 66 Ariz. 339, 348, 199 P.2d 457, 463 (1948). Arizona's courts have consistently held that the Arizona Constitution does not permit the Commission to appropriate money directly:

Under our system of three equal and coordinate branches of government, possibly the greatest check that the legislative department has is control of the "purse strings" and we do not believe that the people in adopting Art. XV, Sec. 3, of the Constitution, which contains no self executing clause, ever intended to there to give unrestricted control of public funds to the Corporation Commission in a matter even as vital as regulating public utilities. Such a loose control would be wholly foreign to our present system of state government.

*Id.* What the Settlement Agreement appears to contemplate is, for all intents and purposes, a direct appropriation by the Commission of public funds. Such an

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<sup>13</sup> Ariz. Const. Art. XV, §16 (If any public service corporation shall violate any of the rules, regulations, orders, or decision of the Corporation Commission, such corporation shall forfeit and pay to the State not less than one hundred dollars nor more than five thousand dollars for each violation, to be recovered before any court of competent jurisdiction.)

<sup>14</sup> *See* Tr. p. 424, lines 13-22.

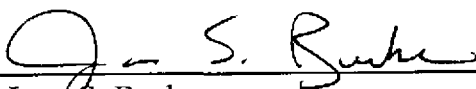
arrangement – essentially an appropriation of unrestricted general funds – is likely unlawful.

#### IV. CONCLUSION

The Commission should reject the Settlement Agreement. The process used in arriving at the agreement was flawed, and the resulting Agreement is unfair and may be unlawful. It is in the Commission's interest to bring about the negotiation of a settlement that has broad support, addresses the needs and interests of all the parties, and provides a fully effective and lawful remedy for Qwest's anti-competitive conduct. The Settlement Agreement proposed by Qwest fails these general yet important requirements.

Dated this 15<sup>th</sup> day of October, 2003.

OSBORN MALEDON, P.A.

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**CERTIFICATE OF SERVICE**

(Docket No. T-00000A-97-0238, RT-00000F-02-0271, T-01051B-02-0871)

I certify that the original and seventeen copies of **TIME WARNER TELECOM OF ARIZONA LLC's** Post Hearing Brief were hand delivered on October 15, 2003 to:

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Docket Control – Utilities Division  
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Phoenix, AZ 85007

and a true and correct copy was hand delivered on October 15, 2003 to:

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Brenda Wendt

**1**

# Settlement Negotiations Timeline

Docket Nos. T-00000F-02-0271; T-00000A-97-0238; T-01051B-02-0871

July 25, 2003  
Qwest and Staff docket  
Settlement Agreement and request  
Commission approval

July 17, 2003  
Comments on Agreement  
due back to Staff by noon

June 27, 2003  
Made final  
271 sub-docket  
regarding settlement  
negotiations

July 15-16, 2003  
Revised draft  
Settlement Agreement  
emailed out by  
Qwest and Staff

July 14, 2003  
Qwest Staff, RUCC,  
and active CLECs  
meet again to discuss  
Principles; draft Settlement  
Agreement distributed

July 10, 2003  
Qwest Staff, active  
CLECs and RUCC meet  
to discuss Principles

July 8, 2003 (5:00 pm)  
Comments due from recipients of  
7/3/03 e-mail; Principles emailed  
to broader group of CLECs.

July 3, 2003  
"Principles of  
Settlement"  
emailed  
to active CLECs

June 19, 2003  
Qwest & Staff  
discuss Agreement;  
Principles complete

June 11, 2003  
Qwest - RUCC  
discuss Settlement  
Principles

May 26 - June 2, 2003  
Settlement Principles developed  
by Qwest and Staff

May 5 - 19, 2003  
Periodic preliminary discussions between Qwest  
and Staff on the possibility of settlement

April 29, 2003  
Qwest contacts  
ACC Staff  
regarding  
possible  
settlement

March 27, 2003  
Qwest asks RUCC  
about possible  
settlement

Mar 27, 2003

Jul 31, 2003

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BEFORE THE ARIZONA CORPORATION COMMISSION

FILED 082121 BY JESSIE DO

AUG 16 2002

*WJ*

WILLIAM A. MUNDELL  
CHAIRMAN  
JIM IRVIN  
COMMISSIONER  
MARC SPITZER  
COMMISSIONER

IN THE MATTER OF QWEST CORPORATION'S  
COMPLIANCE WITH SECTION 252(e) OF THE  
TELECOMMUNICATIONS ACT OF 1996.

DOCKET NO. RT-00000F-02-0271

SUPPLEMENTAL STAFF  
REPORT AND  
RECOMMENDATIONS

The Staff of the Arizona Corporation Commission ("Staff") hereby files its  
Supplemental Report and Recommendation in accordance with the Commissioner's  
Procedural Order dated July 9, 2002, in the above-referenced matter.

RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of August, 2002.

*Maureen A. Scott*

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were filed this 14<sup>th</sup> day of August 2002, with:

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Copies of the foregoing were mailed and/or  
hand-delivered this 14<sup>th</sup> day of August, 2002, to:

Docket Nos.  
T-00000B-97-0238  
RT-00000F-02-0271

## EXHIBIT "A"

COMPANY	252(e) PROCEEDING	271 PROCEEDING
@ Links Networks	Tel. #/Address Unknown	
Adelphia	1 <sup>1</sup>	
AFN		
Allegiance Telecom	1, 2 <sup>2</sup>	X
Arizona Dial Tone	1, 2 Pay Phones	X
AT&T	1, 2	X
Brooks Fiber Communication	WorldCom	
Caltech Int'l Telecom	1, 2	X
Caprock Telecom	McLeodUSA	
Centurytel	1, 2 (Doesn't provide svc. In AZ)	X
CI2	1, 2	X
Citizens Long Dist.	1, 2 Not operating as CLEC in AZ	X
Comm South	1, 2	X
Connect!	#Not in Service	
Covad	1, 2	X
Cox	1, 2	X
Digital Services	No Certification	
DSL Net	1, 2	X
E.Spire	Out of Business	
El Paso Networks	1, 2	X
Electric Lightwave	1, 2	X
Ernest Communications	1, 2	X
Eschelon Telecom	1, 2	X
Global Crossing	1, 2	X
Go Beam	1, 2 Not Providing Services in AZ Yet	
IG2		
Intermedia Communication	WorldCom	
IPVoice Communication	Mail Returned, # Disconnected	
Jato Communication	Out of Business	
KMC Telecom	1, 2	X

<sup>1</sup> Indicates response to Staff's Data Request No. 1

<sup>2</sup> Indicates response to Staff's Data Request No. 2

x Indicates response to Staff's Data Requests

COMPANY	252(e) PROCEEDING	271 PROCEEDING
Level 3	1, 2	X
Livewire Net	Sold Business	
Local Gateway Exchange		
Long Distance Billing	Wrong #	
Looking Glass Networks	1, 2	X
MCI Telecommunications	Worldcom	
Metropolitan Fiber	Worldcom	
Mountain Telephone	1, 2	X
MPower		
NAS	1 In Bankruptcy	
New Edge Networks	1, 2	X
North County Communications	Faxed [REDACTED] 7-12-02	
Now Communications	1, 2	X
OnFiber Carrier Svcs	1, 2	X
Quintelco	1, 2	X
RCN Telecom	1, 2	X
Reflex		
SBC Telecom	1, 2	X
Smoke Signal Communications	1, 2	X
Sprint	1, 2	X
Staples (Now Matrix)	1, 2	
Talk America	1,	X
TCG	ATT	
Tel West Communications	1, 2	
Telepacific Communications	1 Certificate Cancelled	
Teligent Services	1, 2	
Tess Communications	No Longer in Business	
Universal Access of AZ	1, 2 Reseller	
Verizon Select		
Verizon Avenue	1, 2	X
Vivo Communications	Certificate Cancelled	
Vyvx (Williams Comm)	1, 2	X
Winstar Wireless		
WLNI	1, 2	X
WorldCom	1, 2	X
XO Arizona	1, 2	X
Z-Tel	1, 2	X
American Communications	No annual Rpt	
The Phone Company/Network Svc. Of New Hope	Talk America	

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**Arizona Corporation Commission**  
**Open Meeting**  
**February 8, 2001**  
**Discussion Regarding Commission Settlement Policy**

What follows is an excerpt from the closing discussion of the February 8, 2001 open meeting concerning Commission settlement policy and process. During that meeting, the Commissioners agreed upon a general policy regarding notice of settlement discussions in Utilities Division cases. The meeting focused on a written settlement policy drafted by Chairman Mundell. At the conclusion of the meeting Staff provided this summary of the agreed upon policy.

Staff:                    Could I just go over my understanding of what we discussed . . .

Chairman Mundell:    Yes, please.

Staff:                    . . . to make sure I understand that we will notify you -- first of all staff doesn't, since I have been here, Staff does not initiate settlement discussions. Only when the companies come to us is when we go forward with settlement discussions. So once we've been notified by a company that their interested in discussing negotiations we'll file a document in Docket three working days in advance, at least three working days before we have any discussions. That document will be more than just a generic notice. It will include information like who initiated the discussion, who is participating, if there's specific issues that we're aware of. This will be for all cases except D's and E's.